

IN THE SUPREME COURT OF OHIO

THE EAST OHIO GAS COMPANY)
D/B/A DOMINION EAST OHIO,)
))
Appellant,)
))
v.)
))
THE PUBLIC UTILITIES)
COMMISSION OF OHIO,)
))
Appellee.)
))

Case No. 2012 - 2117

**Appeal from the Public Utilities
Commission of Ohio**

**Public Utilities Commission of Ohio
Case No. 11-5843-GA-RDR**

**MERIT BRIEF OF APPELLANT
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INTRODUCTION

This appeal arises from a Commission Order that imposed an approximate \$1.6 million rate reduction on The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO” or “Company”), based entirely and expressly on the fact that DEO’s conduct in 2011 did not satisfy a standard first created in 2012. (See Case No. 11-5843-GA-RDR, Opin. & Order (Oct. 3, 2012) (“the Order”); Appx. 6.) This sort of government action—applying a new standard to penalize past conduct—is a classic example of retroactive action prohibited by the Ohio Constitution. The Order is unlawful and must be reversed.

The context of this case is provided by DEO’s automatic meter reading (“AMR”) program. AMR devices are small electronic modules that connect to existing meters and allow the meters to be read remotely. Approved in late 2008, the program involved cost recovery for DEO’s installation of AMR devices across its entire 1.2-million-customer system. Each year thereafter, DEO was to make an annual update filing in which DEO’s implementation of the program would be reviewed and in which the amount of the charge for the next year would be set.

Two years into the program, in May 2010, the Commission instructed DEO to aim to complete the installation of AMR devices “by the end of 2011.” (Case No. 09-1875-GA-UNC Opin. & Order at 7 (May 5, 2010) (“the 09-1875 Order”); Supp. 7.) DEO geared its efforts to meet this target date. The year 2011 came and went without any further direction from the Commission regarding the target date.

But in the next cost recovery proceeding, in April 2012, the Commission’s Staff recommended penalizing DEO for failing to complete AMR installations by “early August of 2011.” (Staff Ex. 9.0 at 19; Supp. 105.) “Early August of 2011” of course, is nearly five months earlier than “the end of 2011” target date established by the prior order. But by changing the

target date—and only by changing the target date—Staff could recommend a \$1.6 million penalty against DEO.

Time flows forward, not backward, so DEO could do nothing in 2012 to meet Staff’s newly recommended “early August of 2011” deadline. All it could do was defend itself against the recommendation, and DEO explained to the Commission that retroactively changing the target date and applying that new standard to DEO’s past conduct was unlawful, unconstitutional, and unfair.

The Commission then took an inexplicable path. Despite Staff’s recommendation to hold DEO to an “early August of 2011” target date, the Commission clearly and repeatedly affirmed that DEO had until the end of 2011 to complete its task. But despite undermining the sole basis for Staff’s reduction—the retroactive revision of the target date—the Commission nevertheless imposed Staff’s reduction.

Compounding the errors of the Order, the Commission also denied DEO’s motion for a stay, despite DEO’s undoubted ability to recompense customers if the Order were upheld and despite the Commission’s inability to articulate any sound reason for denying it.

The net outcome is a deeply flawed order, in letter and in spirit. By the letter, the Order lacks any record support and fails to satisfy the most basic standard of reasonableness; which is to say, simply making sense. And in spirit, the Order effectively revised a performance standard established in a prior order *after* the time for performance had come and gone. In short, there is no possible legal basis for upholding this Order. The Court should reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In the proceeding below, DEO filed an application with the Commission to reduce its Automated Meter Reading Cost Recovery Charge (“the AMR Charge”) from 57 cents to 54 cents

per customer, per month. The Commission ultimately slashed the charge to 42 cents per customer, per month. Before discussing the proceedings that led to this appeal, DEO would briefly explain what AMR devices are and the general background of the AMR Charge.

A. General Background on the AMR Charge.

AMR devices are small electronic modules that connect to existing meters and allow the meters to be read remotely. They provide many benefits to the Company and to its customers: they improve customer service by allowing DEO to provide accurate monthly meter reads, while avoiding the difficulties and inconvenience associated with accessing meters that are inside homes. The new technology allows meter readers to drive through neighborhoods collecting readings and thereby to avoid many man-hours of labor (as well as locked doors, unfriendly animals, and exposure to the weather). For these reasons, AMR devices substantially reduce DEO's operational meter-reading costs—primarily because DEO can substantially reduce the level of labor and overhead that would otherwise be collected from customers. (*See* DEO Ex. 7.0, Case No. 06-1453 Staff Report at 41–43; Supp. 129–31.)

In view of these and other benefits, DEO filed an application on December 13, 2006, seeking approval of the AMR Charge. The AMR Charge is essentially a surcharge to finance a five-year deployment of AMR devices on all of DEO's approximately 1.2 million meters. Without the AMR Charge, DEO's available capital would have allowed at best a 15-year deployment of the devices. But with the AMR Charge, DEO proposed installing the devices in five years, beginning in January 2008. (*See* DEO Ex. 3.0, Case No. 06-1453-GA-UNC Application at 4 (Dec. 13, 2006); Supp. 122.)

DEO recognized from the beginning that the installation of AMR devices would allow DEO to substantially reduce its meter-reading costs, primarily through the reduction of its meter-reading staff. Thus, it proposed in its initial AMR application to provide a credit to its customers

for meter-reading savings made possible by AMR installations. (*See id.* at 6; Supp. 124.) This credit flows through to customers as a reduction to the AMR Charge.

Although DEO's application was filed towards the end of 2006, it was consolidated with another case in 2007 and was not ruled upon until the fourth quarter of 2008, when the Commission approved DEO's application. (*See* Case No. 06-1453-GA-UNC, Opin. & Order at 10 (Oct. 15, 2008); Supp. 141.)

B. The Commission's 2010 Order

Since the 2008 approval, DEO has filed an annual update proceeding in which the amount of the AMR Charge is set and DEO's administration of the program is reviewed. (*See* P.U.C.O. Case Nos. 09-38-GA-UNC, 09-1875-GA-UNC, 10-2853-GA-RDR, 11-5843-GA-RDR, 12-3116-GA-RDR.) The order in one of those update proceedings (*see* Case No. 09-1875-GA-RDR) shapes much of the present proceeding.

On May 5, 2010, the Commission issued what DEO will call "the 09-1875 Order," and as pertinent here, the 09-1875 Order established the Commission's timing expectations regarding DEO's implementation of the AMR program "by the end of 2011":

[T]he Commission finds that DEO should be installing the AMR devices such that savings will be maximized and rerouting will be made possible in all of the communities at the earliest possible time. Therefore, the Commission expects that DEO's filing in 2011, for recovery of 2010 costs, will reflect a substantially greater number of communities rerouted. The Commission anticipates that, by the end of 2011, it will be possible to reroute nearly all of DEO's communities. To that end, the Commission finds that, in its 2011 filing, DEO should demonstrate how it will achieve the installation of the devices on the remainder of its meters by the end of 2011, while deploying the devices in a manner that will maximize savings by allowing rerouting at the earliest possible time.

(09-1875 Order at 7; Supp. 7.) Note that the 09-1875 Order implicitly required DEO to "achieve the installation of the devices on the remainder of its meters *by the end of 2011.*" (*Id.* (emphasis added).)

C. Progress by the end of 2011

In accordance with the 09-1875 Order, DEO attempted to install AMR devices on the remainder of its meters by the end of 2011. DEO's initial proposal had been to install AMR devices through *the end of 2012*, so the 09-1875 Order had ordered a significant, one-year acceleration of the target date. (See DEO Ex. 3.0, 06-1453 Application at 4 (proposing five-year installation schedule "beginning in January 2008"); Supp. 122.) Nevertheless, by the end of 2011, DEO had installed AMR devices on over 99 percent of its active meters—all but 9,530 out of 1,244,404. (See DEO Ex. 1.0, Friscic Dir. at 3–5; Supp. 24–26.)

There was a reason that each one of those 9,530 meters had not received an AMR device. Each meter belonged to one of two customer groups: either a business customer who required a special appointment (because meter work would disrupt its operations) or a residential customer who simply refused to grant DEO access to the meter. (DEO Ex. 2.0, Fanelly Dir. at 8; Supp. 56.) Regarding the former group, DEO naturally cooperated with its business customers who needed a special appointment. (*Id.* at 6; Supp. 54.) And the latter group—called "hard-to-access" customers—required DEO to engage in a time-consuming notice and scheduling process, which could culminate in a disconnection of service, before it could install the AMR device. (*Id.* at 6–8; Supp. 54–56.)

As noted above, the AMR Charge is reduced by the amount of meter-reading cost savings. So one could reasonably ask whether these 9,530 unconverted meters prevented DEO from achieving any of these savings. The answer is no: the unchallenged evidence at hearing showed that "[t]he inability to install AMR on [the remaining 9,530] large commercial and hard-to-access meters had no recognizable effect on O&M cost savings." (DEO Ex. 2.0 at 8; Supp. 56.) On the contrary, by the first day of 2012, DEO had installed enough devices to transition its entire system from walking routes to driving routes. (*Id.* at 8–9; Supp. 56–57.) Because all of its

routes were being read remotely at the end of 2011, DEO had achieved what it believed were full staffing reductions to its meter-reading staff going into 2012, having trimmed its 2007 level of 108 meter readers and 8 salaried supervisors down to 27 and 2, respectively. (*Id.* at 9; Supp. 57.)¹

D. Staff's Recommendation

On February 28, 2012, DEO filed its application in the docket below. The Commission's Staff reviewed DEO's application, and on April 27, 2012, it filed testimony recommending an annual \$1.6 million reduction to the AMR Charge. (*See* Staff Ex. 9.0, Adkins Dir.; Supp. 86) The reduction reflected the Staff's belief that DEO should have achieved *more* meter-reading savings in 2011. But the reduction was premised on DEO's failure to meet a pair of target dates that contradicted those set in the Commission's earlier, 09-1875 Order.

First, as noted, the 09-1875 Order required DEO to aim to complete "installation of the devices on the remainder of its meters by the end of 2011." (09-1875 Order at 7; Supp. 7.) The Staff, however, recommended that DEO should have "completed installation of AMRs on all active meters in its system in early August of 2011." (Staff Ex. 9.0 at 19; Supp. 105.) Of course, "early August of 2011" is at least five-and-a-half months earlier than "the end of 2011."

Also, as noted, the 09-1875 Order stated the Commission's expectations regarding "rerouting." DEO will discuss what rerouting is later in this brief; what should be noted here is that the 09-1875 Order stated the Commission's expectation that "by the end of 2011, *it will be possible to reroute* nearly all of DEO's communities." (09-1875 Order at 7 (emphasis added); Supp. 7.) This necessarily implied that DEO was not required *to complete* rerouting by the end

¹ When DEO filed its testimony in April 2012, it believed that it had achieved full staffing reductions at 27 meter readers. DEO would note that in the second half of 2012 two meter readers retired, which brought DEO's staff down to 25 meter readers. At this time, DEO is exploring whether this level of staffing is sufficient moving forward.

of 2011. Staff, however, recommended that DEO should have “fully rerouted” by *October 2011*. (See Staff Ex. 9.0 at 19 n.8; Supp. 105).

Had DEO met the Staff’s newly recommended deadlines, Staff estimated that DEO would have achieved an additional “three months of full meter reading O&M savings”—that is, in October, November, and December 2011—which would have totaled an additional \$1.6 million in savings. (*Id.* at 19 & n.8, Supp. 105; *see also* Staff Ex. 9(a), Errata to Staff Ex. 9.0, at 1, Supp. 117.) As Staff described the reduction in its post-hearing brief, the recommended \$1.6 million reduction represented “three months of full meter reading savings for *the last three months of 2011*.” (Staff Post-Hrg. Br. at 15 (emphasis added).) Again, however, the period in which Staff stated that DEO should have achieved these savings from program completion (“the last three months of 2011”) *predated* the target date established in the 09-1875 Order for completion of installations (“the end of 2011”).

Staff’s April 2012 recommendation was the first time anyone had suggested that DEO was expected to meet a target date earlier than “the end of 2011.” DEO did not believe that Staff’s recommendation—to penalize DEO for failing to meet a deadline that was not announced until it had passed—was either legal or fair, and it made these points to the Commission.

E. The Order Below

The Commission issued its Order on October 3, 2012. The Commission confirmed that DEO’s target date for completing installations was December 31, 2011. “[T]he Commission concludes that DEO should have completed the installation of all AMR devices by the end of 2011” (Order at 13; *see also id.* at 17–18; Appx. 18, 22–23.)

This affirmation of the “end of 2011” target date would seemingly have compelled rejection of the Staff’s recommendation. As discussed above, that reduction had depended entirely on an earlier target date: namely, that DEO should have “completed installation of

AMRs on all active meters in its system in early August of 2011.” (Staff Ex. 9.0 at 19; Supp. 105.) If the Commission rejected the earlier deadline, one might have thought that the Commission would have rejected the corresponding reduction.

Yet the Commission adopted the reduction. It found that Staff’s estimation of the additional savings that should have been achieved over “the last three months of 2011” (Staff Post-Hrg. Br. at 15) showed “the appropriate level of O&M savings that should have been achieved by the end of 2011” (Order at 18; Appx. 23).

DEO filed a motion for stay on October 11 and a timely application for rehearing on October 19, both of which explained the various legal problems with what the Commission had done. On December 12, the Commission denied both DEO’s requests for relief. Six days later, DEO timely filed its notice of appeal.

ARGUMENT

Under R.C. 4903.10, “[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.”

The Order below was both unlawful and unreasonable for the following reasons. First, the Commission’s basis for ordering the \$1.6 million reduction lacked any record support. Second, and related, the reasoning in the Order simply does not make sense. Third, the Order effectively and expressly retroactively revises the target dates established in the earlier 09-1875 Order, which exceeds the Commission’s statutory and constitutional authority. Fourth, these revisions of the 09-1875 Order’s target dates are also barred by collateral estoppel. Fifth, and finally, the Commission lacked any reasonable basis for denying DEO’s request for a stay. For these reasons, as explained more fully below, the Court should reverse the Order.

Prop. of Law 1: There is no record support for the \$1.6 million reduction ordered by the Commission.

The most obvious problem with the \$1.6 million reduction is that it lacks any record support.

A. Orders lacking record support must be reversed.

The General Assembly instructs the Supreme Court to reverse a Commission order “if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.” R.C. 4903.13 (emphasis added). Accordingly, “factual support for commission determinations must exist in the record.” *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 90, 706 N.E.2d 1255 (1999). Indeed, the Commission “abuses its discretion when it renders an opinion on an issue without record support.” *Id.*; see also *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 26–33, 647 N.E.2d 136 (1995) (reversing Commission order in part because no record evidence supported its conclusions); *Conrail v. Pub. Util. Comm.*, 47 Ohio St.3d 81, 84–85, 547 N.E.2d 1176 (1989) (reversing Commission order where conclusions were based on speculation and “unsupported by the record”). Likewise, where “the manifest weight of the evidence contradicts the commission’s conclusion,” its order will be reversed. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 29.

Together, these authorities show that the Commission could not reduce DEO’s AMR Charge without a clear evidentiary basis. The Commission cannot reduce a charge simply because it is inclined to do so—there must be a reason, and it must be supported by the evidence. But despite these clear legal requirements, numerous findings lack any record support and are contradicted by the evidence.

B. The evidence did not support the Commission's reduction.

As discussed above, the Commission reduced DEO's annual recovery by \$1.6 million. (See Order at 15 & 18; Appx. 20 & 23.) The only support for this reduction came from Staff's witness. The Commission repeatedly described this reduction as reflecting the amount of cost savings that DEO should have achieved "by the end of 2011." For example, the Order described Staff's recommended reduction as "based on the actual number of meter readers and the reduction in the number of meter readers once the program is fully deployed, *which was to be by the end of 2011.*" (Order at 18 (emphasis added); Appx. 23.) Again, the Commission held that its Staff had demonstrated "the appropriate level of O&M savings that should have been achieved by the end of 2011." (*Id.*)

But these findings not only lack any record support, they are affirmatively contradicted by the record. Staff's reduction was plainly *not* tied to an "end of 2011" completion date, but to an earlier one. Disproving the Commission's characterization of Staff's recommendation is as simple as reading Staff's brief and testimony.

1. The reduction recommended by Staff was based on savings that should have been achieved by October 2011, not the end of 2011.

As noted, the Commission found that its Staff had calculated the "savings that should have been achieved by the end of 2011." (*Id.*) That is not what the Staff had calculated; indeed, it is not even what the Staff *claimed* to have calculated.

If one turns to page 15 of Staff's post-hearing brief, one sees that Staff described the reduction as reflecting "three months of full meter reading savings for *the last three months of 2011.*" (Emphasis added.) This is a correct description of the reduction. On page 19 of Staff witness Kerry Adkins' testimony, Mr. Adkins clearly explains that his calculation assumed that DEO had achieved "fully rerouted remote readings in October through December [2011]." (Staff

Ex. 9.0 at 19 n.8; Supp. 105.) Such progress would have allowed “three months of full meter reading O&M savings” *before* the end of 2011, and those “additional savings” made up the reduction. (*Id.*)² The evidence, then, does not say what the Commission says it did.

Likewise, the Commission found that Staff’s recommended reduction was based on staffing “once the program is fully deployed, which was to be by the end of 2011.” (Order at 18; Appx. 23.) Again, Staff’s recommendation was not based on an “end of 2011” deployment date. On the contrary, Staff’s calculation was *expressly* premised on completed installation of AMR devices by “early August of 2011” and “full meter reading O&M savings” by October 2011. (Staff Ex. 9.0 at 19; *see id.* at 19 n.8; Supp. 105.) Again, the evidence does not support the Commission’s finding.

Despite the Commission’s contrary description, Staff plainly did not calculate the O&M savings that should have been achieved by the end of 2011. Staff did not even claim to.

2. The only evidence regarding DEO’s progress “by the end of 2011” rules out any reduction based on meter-reading O&M cost savings.

More than that, the undisputed record evidence refutes the Commission’s finding that DEO should have achieved additional meter-reading cost savings “by the end of 2011.”

DEO witness Carrie Fanelly explained that by the end of 2011, DEO had achieved *all* savings expected from staffing reductions. (DEO Ex. 2.0 at 8–9; Supp. 56–57.) Staff conceded below, and no one disputes, that salaries avoided by staffing reductions are the main driver of meter-reading cost savings. (*See* Staff Ex. 9.0 at 4 (“Meter reading O&M savings are the costs for meter readers . . . and related supporting items”); Supp. 90.) And the undisputed record evidence showed that “[b]y the first day of 2012, DEO had . . . *made full staffing reductions.*”

² DEO would note that Mr. Adkins, in his direct testimony, recommended a \$1.4 million reduction; he revised this upward to \$1.6 million at the hearing itself. (*Compare* Staff Ex. 9.0 at 19, Supp. 105 *with* Staff Ex. 9(a) (“Errata” to Adkins Dir.) at 1, Supp. 117.)

(DEO Ex. 2.0 at 8 (emphasis added); Supp. 56.) No evidence in the record contradicts Ms. Fanelly's testimony on this point. Thus, the undisputed evidence shows that DEO had achieved full staffing reductions by the end of 2011 and thus was poised to achieve full savings from those reductions heading into 2012.

This highlights what is bizarre about the Order. The dispute between Staff and DEO was *over the target date* for complete installation of AMR devices: DEO argued that the "end of 2011" date established in the 09-1875 Order was the only proper date, while Staff argued in favor of the "early August of 2011" date recommended by its witness in April 2012. No one was disputing either DEO's calculation of actual cost savings *as of the end of 2011* or whether DEO had fully reduced its meter-reading staff by then. So the Order failed even to recognize the nub of the dispute: that the Commission had to adopt Staff's revised target date if it wanted to adopt the reduction. In effect, the Commission took a path recommended by no one.

Why the Commission did this is unclear—the Order's lack of serious analysis of the retroactivity issues raised by DEO plausibly suggests that the Commission wanted to side with its Staff but wanted to overlook the serious legal problems with Staff's recommendation. But in avoiding one serious legal error, it only committed another.

In short, the Commission lacked any evidentiary basis for its reduction of DEO's AMR Charge. The Order must be reversed.

Prop. of Law 2: An order that is substantively unreasonable must be reversed.

Another, related basis for reversal is that the Order is substantively unreasonable—it simply fails to make logical sense.

Commission orders must be reasonable, and unreasonable orders are to be reversed. R.C. 4903.13; *see In re Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 15 (recognizing that an unreasonable order is one that "fails to accord with reason"). The

\$1.6 million reduction ordered by the Commission does not meet this basic standard, because the Commission's reasoning simply does not make sense. It held DEO to one standard (completion of a task by the end of 2011) but then penalized it on the basis of a different standard (completion of the same task by early August of 2011).

A. The Order confirmed that DEO was expected to complete installations "by the end of 2011."

The Order clearly states that the Commission expected DEO to have completed its program by "the end of 2011." This is set forth most clearly on page 13 of the Order: "the Commission concludes that DEO should have completed the installation of all AMR devices by the end of 2011." (Appx. 18.) And this end-of-2011 target date is reaffirmed at least nine times in the paragraphs justifying the \$1.6 million reduction in DEO's charge. (Order at 17–18; Appx. 22–23.) Based on these findings, the Commission described its task as determining "the appropriate level of O&M savings that should have been achieved *by the end of 2011.*" (*Id.* at 18 (emphasis added); Appx. 23.)

To this point, there is no problem in principle with the Commission's reasoning. If the evidence had shown that DEO had disobeyed an earlier order and that this disobedience caused an increase in costs to its customers, DEO concedes that its customers would have deserved a credit for those increased costs. But at this point, the Order takes a turn.

B. The Order penalized DEO for failing to complete installations by early August of 2011.

Despite repeatedly affirming that DEO's target date for AMR installation was "the end of 2011," the Commission adopted Staff's reduction. But that reduction was based on DEO's failure to meet an *earlier* target date.

As DEO has pointed out already, Staff's recommended reduction of \$1.6 million reflected DEO's failure to have "completed installation of AMRs on all active meters in its

system in early August of 2011” and to have achieved full program savings that “October.” (Staff Ex. 9.0 at 19, Supp. 105; Errata to Adkins Dir. at 1, Supp. 117.) Likewise, as Staff’s post-hearing brief put it, the \$1.6 million reduction reflected “three months of full meter reading savings for the last three months of 2011.” (Staff Br. at 15.)

At risk of stating the obvious, the end of 2011 does not fall in “early August of 2011,” nor in “October,” nor over “the last three months of 2011.” Yet the Commission determined that the “savings that should have been achieved by the end of 2011” were the same number as the savings that would have been achieved by October 2011. The dates do not match, and the Order’s reasoning does not add up.

The fact that the Order simply does not make sense is another reason to reverse it.

Prop. of Law 3: The Commission lacked statutory and constitutional authority to alter the legal significance of DEO’s past conduct.

As the foregoing discussion shows, the Order, as written, failed to sensibly apply the evidence before it. And had the Commission fairly characterized the evidence, it would have committed serious legal and constitutional errors by retroactively revising its earlier orders. Thus, the effect of the Order, as well as its stated basis, is unlawful and unreasonable.

A. The Commission generally lacks statutory *and* constitutional power to issue retroactive orders.

“The commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly.” *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999). It follows, then, that if the legislature lacks a particular power, the Commission cannot have that power either. What one does not have, one cannot give.

1. The Ohio Constitution prohibits retroactive laws.

One power that the General Assembly lacks is the power to make retroactive laws. The Ohio Constitution says it plainly: “The general assembly shall have no power to pass retroactive

laws . . .” Ohio Const., Art. II, Sec. 28. A retroactive law is one “made to affect acts or facts occurring, or rights accruing, before it came into force.” *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28 (2000), quoting Black’s Law Dictionary 1317 (6th ed. 1990); *Cincinnati v. Seansongood*, 46 Ohio St. 296, 303, 21 N.E. 630 (1889) (a law that “creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions already past, must be deemed retrospective or retroactive”); see *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 45.

This means that “the General Assembly may not constitutionally impose a new standard upon past conduct.” *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 104, 522 N.E.2d 489 (1988). The possibility for mischief under such laws led this Court to note that “[r]etroactive laws and retrospective application of laws have received the universal distrust of civilizations.” *Id.* And the “laws of all the states and the federal government” go further than merely “distrust” retroactive laws. *Id.* They “disdain” them. *Id.*

For this reason, laws are “presumed to be prospective in operation unless expressly made retrospective.” R.C. 1.48. (The terms “retrospective” and “retroactive” are interchangeable. *Bielat*, 87 Ohio St.3d at 353, 721 N.E.2d 28.) Nevertheless, despite the constitutional prohibition, not all laws “expressly made retrospective” are unconstitutional. There are two kinds of retroactive laws: remedial and substantive.

a. Retroactive laws pertaining only to remedial issues do not offend the Constitution.

If a law is only remedial, it may be retroactive without offending the Constitution. “Remedial” refers to laws that “affect[] only the remedy provided” to enforce one’s rights, *i.e.*, that “relate to procedures” or “rules of practice, courses of procedure, and methods of review.” *Van Fossen*, 36 Ohio St.3d at 108, 522 N.E.2d 489; see *Kiser v. Coleman*, 28 Ohio St.3d 259,

262, 503 N.E.2d 753 (1986) (“Substantive law . . . creates duties, rights, and obligations, while procedural or remedial law prescribes the methods of enforcement of rights or obtaining redress”) (internal citations and quotations omitted).

b. Retroactive laws that affect substantive rights do offend the Constitution.

But retroactive laws that are *substantive* violate the Constitution. This Court has described several types of law that affect substantive rights: one that “impairs or takes away vested rights,” “imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction,” “creates a new right out of an act which gave no right and imposed no obligation when it occurred,” or “gives rise to or takes away the right to sue or defend actions at law.” *Van Fossen*, 36 Ohio St.3d at 107, 522 N.E.2d 489.

As one might expect, laws that impose direct financial consequences on affected parties qualify as substantive. *State ex rel. Bd. of Educ. v. State Bd. of Educ.*, 174 Ohio St. 257, 261, 189 N.E.2d 72 (1963) (“To be guaranteed a minimum amount of money would be a substantive right”); *see also, e.g., Osai v. A&D Furniture Co.*, 68 Ohio St.2d 99, 100, 428 N.E.2d 857 (1981) (retroactive imposition of a “treble-damages provision affects a substantive right”); *Coca-Cola Bottling Corp. v. Lindley*, 54 Ohio St.2d 1, 5, 374 N.E.2d 400 (1978), fn.2 (“the right to a refund” is “a substantive right”); *Hearing v. Wylie*, 173 Ohio St. 221, 180 N.E.2d 921 (1962), paragraph two of the syllabus (“The right of a workman to compensation for an injury is a substantive right”), *overruled on other grounds by Village v. General Motors Corp.*, 15 Ohio St.3d 129, 131, 472 N.E.2d 1079 (1984); *State ex rel. Jeffrey v. Indus. Comm.*, 164 Ohio St. 366, 367, 131 N.E.2d 215 (1955) (“The right to payment for medical and hospital expenses is a substantive right, measured by the provisions of the act in force at the time the cause of action accrues, which is the time the injury is received”).

In short, a law is *not* substantive if it would *not* “impair any . . . vested or accrued rights, violate any reliance interest or reasonable expectation of finality, or impose any new burdens.” *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 48. But “[t]he retroactivity clause nullifies those new laws that ‘reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time the statute becomes effective.’” *Bielat*, 87 Ohio St.3d at 352–53, 721 N.E.2d 28 (brackets omitted), quoting *Miller v. Hixson*, 64 Ohio St. 39, 51, 59 N.E.2d 749 (1901).

2. Under these principles, the Commission generally lacks authority to issue retroactive orders.

As the Commission is a creature of the legislature, these principles and limitations also apply to it. What the legislature cannot do directly, it cannot do indirectly merely by appointing others to do it. The case that makes this clear is *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957.

In *Discount Cellular*, the Court held that the Commission lacked authority to apply a law retroactively unless expressly authorized by the General Assembly. *Id.* ¶ 51. In 1999, acting under R.C. 4927.03, the Commission had issued an order exempting certain wholesale companies from complaint proceedings. *Id.* ¶ 6. Several years later, in 2004, several parties filed a complaint alleging that the wholesalers had committed wrongful conduct *before* 1999 (the year the wholesalers received the exemption). *Id.* ¶ 7. But even though the complained-of conduct occurred *before* the exemption, the Commission dismissed the complaint because it had been *filed after* the exemption. *Id.* ¶ 8.

The Court held that the Commission erred. *Id.* ¶ 51. (The Court did not reverse, however, due to the appellants’ failure to preserve their appeal regarding an alternate ground for

dismissal. *Id.* ¶ 68.) The problem was that the Commission had “exceeded its statutory authority when it retroactively applied R.C. 4927.03” to the retail companies’ claims. *Id.* ¶ 51.

The Court explained that the applicable statute was “not self-executing” but “require[d] some action by the PUCO to give [it] effect.” *Id.* ¶ 43. But although the legislature had not provided “for the statute to be applied retrospectively,” *id.* ¶ 42, the Commission had “applied [it] retrospectively to dismiss causes of action alleging unlawful conduct occurring prior to the effective date of [the implementing] order,” *id.* ¶ 47. In other words, “the PUCO altered the legal significance of the [complainants’] past conduct.” *Id.* ¶ 51. Because the legislature “did not expressly state that R.C. 4927.03 was to be applied retrospectively . . . the PUCO exceeded its statutory authority when it retroactively applied [it].” *Id.*

Notably, the Court did *not* ask the follow-up question: whether the retrospective act was remedial or substantive. It did not need to. The Commission was not authorized to apply the statute retroactively, yet it had done so, and that settled the case. But even *had* the General Assembly authorized retroactive action, that only would have led the Court to “move on to the question of whether the [order] is substantive, rendering it *unconstitutionally* retroactive.” *Bielat*, 87 Ohio St.3d at 353, 721 N.E.2d 28 (emphasis sic). The case law strongly suggests an affirmative answer: substantive laws include those that “give[] rise to or take[] away the right to sue or defend actions at law.” *Van Fossen*, 36 Ohio St.3d at 107, 522 N.E.2d 489.

In other words, before the Commission may act retroactively, it must clear *two* hurdles: one legislative (it must be authorized to act retroactively) and one constitutional (the retroactive act may not affect substantive rights).

3. The Commission’s modification powers only operate prospectively.

Does all this mean that once the Commission has made a decision, it may *never* change course going forward? Not at all: “as a general rule, the commission,” like the legislature, “has

discretion to revisit earlier regulatory decisions and *modify them prospectively.*” *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 8 (emphasis added); *see also, e.g., In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 (“the commission may . . . revisit a particular decision” but the “new course also must be . . . lawful”).

The key word in the foregoing quotation is “prospectively”: the general modification power goes forward, not backward. (This is not to say that the Commission’s prospective modification power is unlimited, either—among other things, collateral estoppel could act as a limit on its power to revisit earlier decisions, even if the new decision is only effective prospectively.) As already discussed, the law is clear that the Commission generally lacks statutory authority to “retroactively appl[y]” the laws it administers, and it necessarily lacks constitutional authority to “alter[] the legal significance of [a party’s] past conduct,” to the extent it bears on substantive rights. *See Discount Cellular*, 112 Ohio St.3d at 372, 859 N.E.2d 957. So while the Commission generally has power to take different approaches going forward, it has no power to reach back and apply new decisions to *past* conduct.

All this means that the Commission cannot retroactively increase the requirements of past orders when a person has reasonably relied on those requirements and has lost any chance of complying with the newly heightened requirements. And the Commission certainly cannot do this in order to impose a financial penalty on that party.

B. The Order retroactively modifies numerous requirements in the 09-1875 Order.

Notwithstanding these prohibitions, the Order expressly or implicitly alters the standards that DEO relied upon and then penalized DEO for failing to satisfy the retroactively modified standards.

1. The Commission effectively revised DEO's target date to complete AMR installations.

The first retroactive modification pertained to the target date for DEO to complete the installation of AMR devices.

The 2008 order that first approved DEO's AMR Application did not specify a date by which installation of the devices should be completed. (See 06-1453 Order; Supp. 132.) In its application, DEO had specified a five-year deployment schedule beginning in January 2008. (DEO Ex. 3.0 at 4; Supp. 122.) So what DEO proposed, and what the Commission approved, was an accelerated deployment during the years 2008, 2009, 2010, 2011, and 2012.

But the Commission adjusted these timing expectations in May 2010. At that time, the Commission instructed DEO to aim to "achieve the installation of the devices on the remainder of its meters by the end of 2011." (09-1875 Order at 7; Supp. 7.) Rather than belabor the point of whether DEO should have had until the end of 2012 to complete the deployment, DEO geared its efforts towards meeting the end-of-2011 target date.

Then, in October 2012, the Commission effectively revised the end-of-2011 deadline. It imposed a financial penalty on DEO that was expressly tied to DEO's failure to meet an *earlier* deadline—"early August of 2011." (See Staff Ex. 9.0 at 19; Supp. 105.)

In other words, the first time the Commission gave any indication that it intended to hold DEO to an "early August of 2011" deadline was *14 months after* that deadline had passed. At that time, it imposed a penalty specifically calculated based on that new deadline.

This shows that the Commission "altered the legal significance of [DEO's] past conduct," *Discount Cellular*, 112 Ohio St.3d at 372, 859 N.E.2d 957, and "impose[d] a new standard upon [DEO's] past conduct," *Van Fossen*, 36 Ohio St.3d at 104, 522 N.E.2d 489. When DEO acted from May 2010 through the end of 2011, it was under instruction by the Commission to aim for

complete installation by the end of 2011. “Early August of 2011” had no legal significance. In October 2012, once all of 2011 had come and gone, the Commission for the first time intimated that DEO should have completed its task two Augusts before.

2. The Commission expressly revised the 09-1875 Order’s rerouting requirements.

This is not the only example of changing a past requirement after the fact. The Commission also revised a requirement from the earlier order regarding rerouting. Rerouting is one of the last steps in the AMR program; it is essentially a final fine-tuning of the meter-reading routes *after* they have been converted from walking to driving routes. (See DEO Ex. 2.0 at 5–6 (describing rerouting) Supp. 53–54; *see also* Tr. 74 (“rerouting is done after the meters are read electronically”); Tr. 155–58 (describing multiple steps antecedent to and necessary to complete rerouting).)³

The key point to note about rerouting is that regardless of *when* it occurred, the record shows that DEO’s timing of rerouting did not delay any achievement of O&M cost savings—even though rerouting was not completed at the end of 2011, full staffing reductions had already been made. (See DEO Ex. 2.0 at 9; Supp. 57.)

a. DEO satisfied the standard set forth in the earlier order.

In May 2010, the Commission stated its expectation that “by the end of 2011, *it will be possible* to reroute nearly all of DEO’s communities.” (09-1875 Order at 7 (emphasis added); Supp. 7.) These words necessarily imply that DEO could permissibly have been unprepared to

³ The Commission mischaracterized rerouting in the Order, equating it with the conversion from walking to driving routes. (See Order at 2 n.1; Appx. 7.) On rehearing, DEO marshaled the evidence that showed the Commission was mistaken. (See, e.g., Tr. 99 (the “two shops for which . . . rerouting had not taken place yet . . . were being read with the AMR devices and [DEO had] eliminated the walking routes”); DEO Ex. 1.0 at 11 (by the end of 2011, “DEO has eliminated walking routes” and “only two local shops remained to be fully rerouted”); Supp. 32.) The Commission did not address the factual error any further on rehearing, so it is not clear whether the Commission recognized this error.

reroute at least one community at the end of 2011. The 09-1875 Order did not require that rerouting be *complete* for *all* communities at the end of 2011—only that it “be possible” for “nearly all” communities. (*Id.*)

This reading of the Order is the only sensible one, and it was confirmed in the next annual AMR update proceeding, Case No. 10-2853-GA-RDR. In that case, as part of its February 28, 2011 application, DEO filed its proposed plan for rerouting in 2011. (*See* DEO Ex. 4.0; Supp. 15.) That plan expressly stated that DEO intended to initiate the rerouting of the final two areas *in 2012*. (*See id.* at 2 (bottom table shows that “Western” and “Youngstown” local offices scheduled to have rerouting “[i]nitiating” in 2012); Supp. 16.) Had the Commission or any other party expected DEO to “fully reroute” by the end of 2011, this would have been an ideal time to raise the issue. But no party raised any issue with DEO’s proposed rerouting timeline in that case, nor did the Commission find any fault with it.

DEO adhered to its plan, and by the end of 2011, it had not only satisfied the standard set forth in the 09-1875 Order, it had exceeded it. At that time, the undisputed record evidence showed that it was possible to reroute *all* of DEO’s communities, not just “nearly all.” (*See* DEO Ex. 2.0. at 5 (“Q. By the end of 2011, had it become possible to reroute [the] two shops [that had not been rerouted]? A. Yes.”); Supp. 53.) And just as predicted in its plan filed in the previous case, only two local offices (“Western and Youngstown”) remained to begin rerouting. (*Id.*)

b. In 2012, the Commission increased the standard set forth in the 09-1875 Order.

In October 2012, however, the Commission ramped up the rerouting requirement. It faulted DEO for “fail[ing] to comply with our directive that it *achieve* rerouting of nearly all communities in 2011.” (Order at 18 (emphasis added); Appx. 23.) But the Commission plainly

changed the words and meaning of the earlier order. It replaced the phrase “it will be possible to reroute” with the phrase “achieve rerouting.” (*Compare* 09-1875 Order at 7, Supp. 7 with Order at 18, Appx. 23.) The Commission left unmentioned the fact that it had raised no issue with DEO’s plan, filed in Case No. 10-2853-GA-RDR, to begin rerouting the very areas at issue in 2012. (*See* DEO Ex. 4.0 at 2; Supp. 16.)

So again, the Commission changed the standard and then applied the new standard to past conduct. DEO did not receive guidance that it was to *complete* rerouting in 2011 until October 2012. As before, the Commission “impose[d] a new standard upon [DEO’s] past conduct.” *Van Fossen*, 36 Ohio St.3d at 104, 522 N.E.2d 489.

In sum, the Commission retroactively modified two provisions of the 09-1875 Order, which leads to the next question: did the Commission have statutory authority to do so?

C. The Commission lacked any statutory authority to retroactively modify its earlier order.

Because the Order was expressly and effectively retroactive, the Commission lacked authority to enter it unless it received express statutory authority to that end. *See Discount Cellular*, 112 Ohio St.3d at 373, 859 N.E.2d 957; R.C. 1.48.

The Commission hardly acknowledged the retroactivity issues raised by its imposition of Staff’s penalty, and it did not attempt to identify any statutory provisions that expressly authorized retrospective action. Nor is DEO aware of any statute that applied here and authorized a retroactive order.

In short, no statute gave the Commission authority to retroactively modify the 09-1875 Order. Yet the Commission did so and thus exceeded its authority. Under *Discount Cellular*, this alone is grounds for reversal.

D. Finally, even had retroactive action been statutorily authorized, the Order affected substantive rights and thus would have been unconstitutional.

Since no statute authorized retroactive modification, the Commission lacked authority to enter the challenged provisions of the Order, and it is unnecessary to answer whether the modification was constitutional. But for sake of completeness, DEO would note that even if there were such an authorization, that would only lead the Court to “move on to the question of whether the [Order] is substantive, rendering it *unconstitutionally* retroactive.” *Bielat*, 87 Ohio St.3d at 353, 721 N.E.2d 28 (emphasis sic).

There can be no serious argument that an Order that directly deprives a business of over \$135,000 a month does not affect substantive rights. As cited above, numerous cases confirm the obvious: government actions that directly impose financial consequences on affected parties are substantive in nature. “To be guaranteed a minimum amount of money would be a substantive right” *State ex rel. Bd. of Educ. v. State Bd. of Educ.*, 174 Ohio St. 257, 261, 189 N.E.2d 72 (1963); *see also, e.g., Osai v. A&D Furniture Co.*, 68 Ohio St.2d 99, 100, 428 N.E.2d 857 (1981) (treble-damages provision); *Coca-Cola Bottling Corp. v. Lindley*, 54 Ohio St.2d 1, 5 n.2, 374 N.E.2d 400 (1978) (right to a refund); *Hearing v. Wylie*, 173 Ohio St. 221 (1962), paragraph two of the syllabus, 180 N.E.2d 921 (compensation for an injury), *overruled on other grounds by Village v. General Motors Corp.*, 15 Ohio St.3d 129, 131, 472 N.E.2d 1079 (1984); *State ex rel. Jeffrey v. Indus. Comm.*, 164 Ohio St. 366, 367, 131 N.E.2d 215 (1955) (payment for medical and hospital expenses). Because the modification affected substantive rights, it would have been unconstitutional even had it been authorized.

In short, the Order, both expressly and in effect, retroactively revised requirements of an earlier order to inflict financial harm on DEO. The Commission thus exceeded its statutory and constitutional authority and must be reversed.

Prop. of Law 4: Commission orders that retroactively change the requirements of past orders also violate collateral estoppel.

The retroactive changes discussed above also violate the doctrine of res judicata and collateral estoppel.

A. Res judicata and collateral estoppel apply to the Commission and prohibit it from revising points of law or fact that were settled in past orders.

“The doctrine of collateral estoppel operates to ‘preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.’” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 342, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 11, quoting *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985); cf. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 12 (“The doctrine is inapplicable [where] there was no relitigation in [the later] matter of a point of law or finding of fact that was passed upon by the commission in the [earlier] case”). As the foregoing case captions suggest, “[r]es judicata, whether claim preclusion or issue preclusion, applies to quasi-judicial administrative proceedings.” *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶ 29.

By revising requirements in the 09-1875 Order, the Commission violated the doctrine of collateral estoppel.

B. The Order was barred by collateral estoppel.

In two respects, the Order was barred by collateral estoppel.

1. The Commission’s effective revision of the installation target date was barred by the 09-1875 Order.

The first collateral-estoppel problem relates to the target date for AMR installations. As already explained in detail, the 09-1875 Order instructed DEO to aim for completed AMR

installations by the end of 2011. (See 09-1875 Order at 7; Supp. 7.) Thus, the question of the target date for installations was directly at issue in the prior proceeding, a proceeding to which Staff was a party, and no party challenged the end-of-2011 target date through rehearing or appeal.

But even though the target date for installations was a specific point resolved by the 09-1875 Order, the Order adopted Staff's reduction, which openly moved that target date from the "end of 2011" to "early August of 2011," in order to penalize DEO. The target-date issue "was directly at issue in the prior proceeding," "was passed upon by the commission," and no party challenged its resolution through rehearing or appeal. See *Ohio Consumers' Counsel*, 16 Ohio St. 3d at 10, 475 N.E.2d 782. This means that the revision was barred by collateral estoppel.

2. The Commission's express revision of the rerouting requirements was barred by the 09-1875 Order.

The second collateral-estoppel problem relates to rerouting. The 09-1875 Order established the expectation that, "by the end of 2011, it will be possible to reroute nearly all of DEO's communities." (09-1875 Order at 7; Supp. 7.) As discussed above, this language necessarily meant that DEO was not required to complete rerouting by the end of 2011—indeed, it meant that DEO permissibly could have had at least one community that it was unprepared to reroute. No party challenged this resolution of rerouting timing on rehearing or appeal.

Nevertheless, in the proceeding below, the Commission expressly revised this requirement. The Order faults DEO for failing to "*achieve rerouting* of nearly all communities in 2011." (Order at 18 (emphasis added); Appx. 23.) But by omitting the phrase "it will be possible to reroute," the Commission changed the standard. The 09-1875 Order did not require DEO "to achieve rerouting" of nearly all of its communities by the end of 2011; it held only that it should "be possible" to do so by then.

As with the issue of target date, the “question [of rerouting progress at the end of 2011] was directly at issue in the prior proceeding,” it “was passed upon by the commission,” and no party challenged the target dates through rehearing or appeal. *See Ohio Consumers’ Counsel*, 16 Ohio St.3d at 10, 475 N.E.2d 782. Again, those decisions cannot be revisited, particularly once the opportunity for compliance has past.

The Order’s violation of the doctrine of collateral estoppel is yet another ground on which it should be reversed.

Prop. of Law 5: The Commission erred in denying DEO’s motion for stay below.

DEO also filed a motion for stay of the Order on October 11, 2012. The Commission denied both the motion and DEO’s arguments on rehearing on the grounds that DEO failed to satisfy a four-part test articulated in a dissent in *MCI Telecom. Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 605, 510 N.E.2d 806 (1987) (Douglas, J., dissenting). No other Justice joined this dissent, and to DEO’s knowledge, it has never been cited by another court.

Nevertheless, the Commission applied this test, which states that a request for stay pending appeal should be evaluated based on the following factors:

- 1) “whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits”;
- 2) “whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay”;
- 3) “whether the stay would cause substantial harm to other parties”; and
- 4) “where lies the public interest.”

(*See* Entry on Rehg. at 10, *citing In re Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Co.*, Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009); Appx. 37.) The Commission found that DEO had failed to satisfy a single factor of this test.

The Commission erred both in applying this test at all and also in finding that DEO failed to satisfy it.

A. The Commission erred by denying DEO's motion for stay when DEO showed that it could secure all parties from any substantial harm.

The first aspect of the Commission's error was to apply a merits-based test to a motion for stay pending appeal. In doing so, the Commission was out of step with Ohio law.

1. Ohio law requires the granting of stays pending appeal if the appellant can secure other parties from harm.

Under Ohio law, courts are *required* to grant stays of disputed orders pending appellate proceedings, so long as the party seeking the stay can provide adequate financial security.

"Pursuant to [Civ.R. 62], defendants-appellants are entitled to a stay of the judgment *as a matter of right*. The lone requirement of Civ.R. 62(B) is the giving of an adequate supersedeas bond." *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 571, 722 N.E.2d 73 (2000) (brackets sic; emphasis added); *see also, e.g., State ex rel. Geauga Cty. Bd. of Comm'rs v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, 800 N.E.2d 361, ¶ 17 (same).

The public utilities statutes are entirely consistent with this rule and support its application. R.C. 4903.16 permits a stay by this Court with the single substantive requirement that "the appellant shall execute an [adequate] undertaking." As the Court recently held, "any person who feels aggrieved" by an order has "*a right* to secure a stay of the collection of the new rates after posting a bond." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 17 (emphasis added), *quoting Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957).

These rules make abundant sense. Decision-makers sometimes get cases wrong. So long as the appellant can secure the other parties from harm, no worthy interest is served by forcing an aggrieved party to potentially suffer irreparable damage while the case winds its way through

further proceedings. Moreover, requiring an appellant to convince the same tribunal that just *ruled against it* on the merits that the appellant is likely to *prevail* on the merits makes little sense. Application of such a standard means that a stay pending appeal, generally available as a matter of right, will essentially be denied as a matter of course.

2. DEO showed that it could protect all parties from any substantial harm, so there was no reason to deny its requested stay.

Given that DEO undoubtedly could protect all parties from any substantial harm, there was no good reason for denying the stay.

DEO showed that it could protect all parties from harm. It proposed tracking the difference between DEO's then-current charge and the charge the Commission ordered, applying carrying charges to that amount, and (if the Order was upheld on appeal) refunding that amount to its customers. DEO also offered to obtain reasonable financial security in whatever form ordered by the Commission, including payment of the accrued amount into escrow or provision of a supersedeas bond. And DEO expressed its willingness to explore additional ways to protect against any other harms identified by the Commission and to take any reasonable steps to that end. (*See* Case No. 11-5843-GA-RDR, DEO Mot. for Stay at 5–6 (Oct. 11, 2012).)

Granting the requested stay only would have ensured that each party received what it deserved. Were DEO to prevail in its appeal, it would have earned no more than the return to which it was entitled under the law. Were DEO to lose, its customers would have received back a full refund with interest. The only thing the Commission accomplished by denying the stay was to ensure that DEO would be financially harmed, even if it were correct on the merits.

3. The Commission articulated no sound reason for not following Ohio's general law regarding stays pending appeal.

The Commission rejected Ohio's general standards regarding stays pending appeal. It found that this "criterion for a stay is self-serving and fails to take into consideration the potential

harm to customers and the public interest if the Commission were to require customers to pay over one million dollars in unwarranted charges.” (Entry on Rehg. at 12; Appx. 39.)

As for the first reason, saying that Ohio’s general law regarding stays pending appeal is “self-serving” makes little sense. As the Court can see, DEO did not invent this standard to suit its own interests. The standard is set forth in Ohio’s laws, civil rules, and judicial decisions, and it was applicable in the situation below (that is, on a pending appeal). Moreover, the standard is not self-serving—if DEO wins, it is protected from unwarranted financial harm; if it loses, its customers are protected from the same. The standard applies equally, and simply protects against windfalls.

As for the Commission’s second reason—that the stay standard “fails to take into consideration the potential harm to customers” (Entry on Rehg. at 12; Appx. 39)—this is simply false. Under the standard discussed above, a stay is not granted if the appellant cannot secure other parties from financial harm. Harm to customers is plainly considered and accounted for.

In short, the standard proposed by DEO is the standard applicable to all appeals, whether from trial courts or from the Commission to this Court. The Commission articulated no sensible reason not to apply it. The Court should reverse the Commission’s denial of the stay, with instructions to apply the proper standard going forward.

B. The Commission erred by relying upon and finding that DEO did not satisfy its four-part test.

As noted, the Commission applied its four-part test in denying the stay. The test used by the Commission to evaluate motions for stay pending appeal is primarily used to determine whether a trial court should grant a preliminary injunction. *See, e.g., Battelle Mem. Inst. v. Big Darby Creek Shooting Range*, 192 Ohio App.3d 287, 2011-Ohio-793, 948 N.E.2d 1019, ¶ 21; *Ulliman v. Ohio High Sch. Athletic Assn.*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d

763, ¶ 35–36; *see also Int’l Diamond Exch. Jewelers, Inc. v. U.S. Diamond & Gold Jewelers, Inc.*, 70 Ohio App.3d 667, 674, 591 N.E.2d 881 (1991) (applying test to motion to dissolve preliminary injunction before adjudication of the merits). This is the wrong test. A preliminary injunction applies the law’s compulsive force before there is a full merits determination, so the test is understandably stringent on the merits question.

It is not the test for granting a stay pending appeal; as noted above, stays are available to would-be appellants *as a matter of right*. Applying this test, the Commission found that DEO had not satisfied a single factor of the test—not even that DEO would suffer irreparable harm in the non-refundable loss of over \$135,000 a month. But as the following discussion shows, the Commission erred in these conclusions.

1. The Commission erred in finding that DEO would not prevail on the merits.

As for the first finding, the Commission held that “DEO would not prevail on the merits, because it failed to carry its burden of proof in this case.” (Entry on Reh’g. at 12; Appx. 39.)

DEO explained above why the Order lacked merit; obviously, it is for the Court to decide whether DEO is correct. But DEO would note that regardless of whether DEO ultimately prevails, it was inappropriate to deny a stay on the basis of this factor. At a minimum, there were *bona fide* reasons to challenge the Order, and DEO believes that any fair-minded observer would grant that there are reasonable grounds for dispute. Frankly, in DEO’s view, the Order is blatantly erroneous—but even were it a close case, the Commission should have given the appealing party the benefit of the doubt and granted the stay. That is particularly the case, given that the jurisprudence regarding the four-part test counsels that “[n]o one factor in the analysis is dispositive” and that all “four factors must be balanced.” *Great Plains Exploration v. Willoughby*, 11th Dist. No. 2006-L-022, 2006-Ohio-7009, ¶ 11 (Ohio Ct. App. Dec. 29, 2006).

The Commission should not have ruled against DEO on the first factor.

2. The Commission erred in finding that DEO would not suffer irreparable harm if it denied the stay.

The second factor considered by the Commission was whether the party seeking the stay would suffer irreparable harm absent the stay. Remarkably, the Commission found that “DEO has failed to substantiate that it will be irreparably harmed if it is required to comply with the Commission’s conclusion in this case and implement the lower charge.” (Entry on Rehg. at 12; Appx. 39.)

“Irreparable harm exists where there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete.” *1st Natl. Bank v. Mountain Agency, LLC*, 12th Dist. No. CA2008-05-056, 2009-Ohio-2202, ¶ 47. This “means that the legal remedy must be as efficient as the indicated equitable remedy would be; that such legal remedy must be presently available in a single action; and that such remedy must be certain and complete.” *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, 768 N.E.2d 619, ¶ 81. Unless the Court makes an exception in the future, Ohio law does not generally allow refunds of charges that prove either too high or too low. *See, e.g., Lucas County Comm’rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997).

This meant that under existing law, DEO was sure to suffer irreparable harm if the Commission denied the stay. The Order directly reduced DEO’s revenue by over \$135,000 each month, which is \$1.6 million a year. The Commission’s second finding, that the permanent loss of over a hundred thousand dollars per month is not irreparable harm, was clearly erroneous.

3. The Commission erred in finding that other parties would be harmed if the stay was granted.

The third factor that the Commission considered was whether the stay would cause substantial harm to other parties. The Commission said that it was “concerned that the customers

will be harmed if the stay is imposed and they are required to pay higher rates than those supported by the record in this case.” (Entry on Rehg. at 12; Appx. 39.)

The Commission had no basis for this concern. The Commission simply disregarded the fact that DEO would refund whatever was stayed, with interest, if the Order was upheld. As DEO explained above, DEO was more than able to secure its customers from any harm—the impact of the stay would have been minimal (only 14 cents per month, per customer), and DEO was willing and able to refund the stayed amount with interest if the Order was upheld. The Commission did not identify any way that DEO would be unable to protect its customers.

Moreover, DEO specifically told the Commission that “if DEO has failed to account for any harm that would result from a stay, it is willing to explore ways of eliminating such harm and will take any reasonable step to do.” (Case No. 11-5843-GA-RDR, DEO Motion for Stay at 14 (Oct. 11, 2012).) The Commission identified no such harm, nor did it give DEO any opportunity to cure it.

In short, there was no basis for denying the stay based on harm to customers.

4. The Commission erred in finding that the public interest favored denying a stay.

Finally, the Commission found that denying a stay “appropriately protects the public interest by only allowing DEO to charge a rate that is supported by the record.” (Entry on Rehg. at 12; Appx. 39.)

This, too, was error. As Ohio law recognizes, the public interest supports granting a stay so long as the appellant can secure other parties from harm. Granting a stay would have guaranteed that DEO collected and its customers paid no more and no less than a just and reasonable charge, as determined by law. If the Order were overturned, DEO would have received what was due. If the Order were upheld, customers would have received back the

difference between the amount charged and the proper charge, with interest. In short, granting a stay would have assured that no party received a windfall in this case, and that every party received only what it deserved.

That the public interest will be furthered by granting a stay is confirmed by Ohio law. As discussed above, Ohio law *requires* the granting of stays, so long as the party benefiting from the stay can provide adequate financial security. *State ex rel. Geauga Cty. Bd. of Comm'rs v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, 800 N.E.2d 361, ¶ 17. DEO showed that it could protect customers, and the Commission had no basis to find otherwise.

Again, the Commission simply ignored the reality that DEO would refund the amount of the stay, with interest, if the Order was upheld. As none of the Commission's bases for denying DEO's motion for stay were meritorious, the Commission erred by denying the stay.

C. If the Court upholds the Commission's denial of the stay, it will mean that the Commission may deny a stay for no reason.

DEO is not suggesting that the Commission can *never* deny a stay. Any time a moving party could not secure the non-moving party from all substantial harm, the stay would be appropriately denied. And perhaps there may exist a rare case where non-financial reasons compel the denial of stay even where adequate financial security has been provided.

But this is not such a case. There is no question here that financial security was straightforward to calculate, fully compensable of any harm, and easily provided by DEO. This was a relatively simple case and a very small amount of money on a per customer basis—again, literally pennies. It cannot be seriously questioned that DEO could have secured its customers from any and all harm caused by a stay. This is only confirmed by the Commission's inability to provide any reasonable basis for denying the motion.

Given the lack of any reason for denying a stay, if the Court affirms the Commission's denial of DEO's motion, it will effectively affirm that the Commission may deny a stay for a bad reason or for no reason at all: arbitrarily, neglectfully, even out of spite. That cannot be the law. Again, the Commission's orders must be *reasonable*, R.C. 4903.13, and the Commission itself is subject to due-process and other constitutional constraints. Indeed, it would be an odd regime of law in which Ohio's courts *must* stay their decisions pending appeals, while the Commission (which has far less jurisdiction than Ohio courts and little direct political accountability) is free to grant or deny stays for whatever reason it pleases.

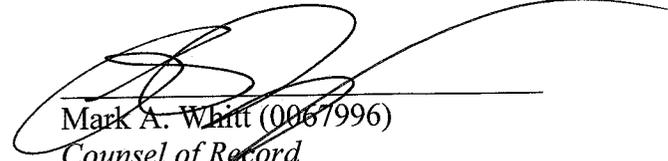
If there is no sound reason to deny a motion for stay, by definition it is unreasonable and hence reversible error to deny it. That describes the decision below. The Court should reverse the Commission's denial of the stay, with instructions to apply the proper standard going forward.

CONCLUSION

For the foregoing reasons, DEO respectfully requests that the Court reverse the Order as set forth above, that it instruct the Commission regarding the proper standard to be applied to requests for stay, and that it grant any other necessary and proper relief.

Dated: February 26, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark A. Whitt', is written over a horizontal line. The signature is stylized and loops back to the right.

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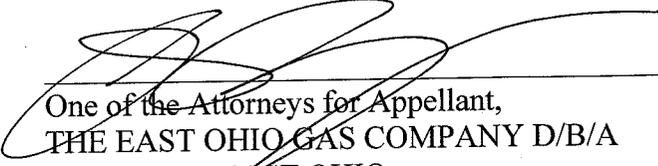
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant, DEO, was served by U.S. mail this 26th day of February, 2013, upon the following:

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